Supreme Court, U.S.
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No. 94-745

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MARK CHASSIN, M.D., in his capacity as New York State Commissioner of Health; LORNA H. MCBARNETTE, in her capacity as New York State Executive Deputy Commissioner of Health; STEVEN C. ANDERMAN, in his capacity as Deputy Director, Division of Health Care Financing, Office of Health Systems Management, New York State Department of Health,

Petitioners,

-against-

NYSA-ILA MEDICAL AND CLINICAL SERVICES FUND, by its Trustees, JOHN BOWERS, JAMES CAPO, FRANK LONARDO, WILLIAM P. LYNCH, M. BRIAN MAHER, JAMES P. MELIA, GERALD OWENS and PETER VICKERS,

Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Rule 29.1 Statement

In accordance with Sup. Ct. R. 29.1, respondents state that none of them has a corporate parent, subsidiary, or affiliate.

No. 94-745

IN THE

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OCTOBER TERM, 1994

MARK CHASSIN, M.D., in his capacity as New York State Commissioner of Health; LORNA H. McBARNETTE, in her capacity as New York State Executive Deputy Commissioner of Health; STEVEN C. ANDERMAN, in his capacity as Deputy Director, Division of Health Care Financing, Office of Health Systems Management, New York State Department of Health,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

The petition in this case is nothing more than an attempt to piggyback upon the writ of certiorari recently issued by this Court in *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708 (2d Cir. 1993), *cert. granted*, 115 S. Ct. 305 (U.S. Oct. 7, 1994)

(Nos. 93-1408, 93-1414, 93-1415). *Travelers* and this case, however, are poles apart, and petitioners' attempted ride on the coattails of *Travelers* is a futile excursion that leads nowhere.

Travelers involves a challenge by a group of commercial insurance carriers and their trade association to invalidate New York's system of imposing surcharges on hospital bills paid by commercial insurers and Health Maintenance Organizations but not on hospital bills paid by Blue Cross/Blue Shield insurers. 14 F.3d at 712. The surcharge scheme was designed to enhance artificially the competitiveness of the latter group of insurers vis-à-vis the former. The Second Circuit concluded that § 514 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C.A. § 1144 (West 1985 & Supp. 1994), pre-empted New York's hospital rate-setting system because that state law (1) purposely interferes with the choices ERISA plans make for healthcare coverage and (2) substantially increases the cost to ERISA plans of providing healthcare benefits to their beneficiaries. 14 F.3d at 719-20.

The court of appeals found that the hospital rate-setting system in *Travelers* relates to ERISA plans, the statutory touchstone for pre-emption, because it has a connection with ERISA plans.[1] This connection, however, is indirect because

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[1] In 1974 Congress enacted ERISA, a comprehensive regime to protect the interests of employees and their beneficiaries in private employee benefit plans. *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. ___, 113 S. Ct. 580, 582 (1992). ERISA's "crowning achievement" was the elimination of state regulation of ERISA plans. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990); *Shaw v. Delta Air Lines*, 463 U.S. 85, 99 (1983). Congress fostered this objective by adopting a "deliberately expansive" express pre-emption clause, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987), that is "conspicuous for its breadth." *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990). The clause, ERISA § 514(a), provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C.A. § 1144(a) (West 1985).

the surcharges are imposed not on ERISA plans themselves but on insurance carriers providing health insurance coverage to the plans and their beneficiaries. It is this indirect feature which prompted the United States to recommend the issuance of a writ of certiorari in *Travelers* to enable this Court to decide the question whether ERISA pre-empts "generally applicable state laws that have only an indirect economic effect on ERISA plans." Brief for United States As Amicus Curiae at 9, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 305 (U.S. filed Sept. 1994) (Nos. 93-1408, 93-1414, 93-1415). The United States acknowledged that the direct application of state law to ERISA plans would present entirely distinct issues not present in *Travelers*. *Id.* at 14 n.5.

This case involves the very type of state enactment which, in the view of the United States, lacks the elements that make *Travelers* worthy of review by this Court. The Second Circuit determined that the state law at issue in this case imposes "an immediate tax on payments and contributions which were intended to pay for participants' medical benefits . . . [and] thus directly affects the Fund in its principal role as an employee welfare benefit plan." *NYSA-ILA Medical & Clinical Serv. Fund v. Axelrod*, 27 F.3d 823, 827 (2d Cir.), *pet. for cert. filed*, No. 94-745 (U.S. filed Oct. 21, 1994).

While petitioners purport to squeeze this case into the "indirect economic effect" mold of *Travelers*, *see* Petition for Certiorari (hereinafter "Pet.") at 7-8, their petition, without forthrightly saying so, seeks review not of the "indirect economic effect" test adopted in *Travelers* but of the more comprehensive question whether *any* economic impact, direct or indirect, is sufficient to trigger ERISA pre-emption. The pretense that this case is a replay of *Travelers* dissipates in the petition as any mention of the indirectness of the effect disappears and petitioners articulate their real objection to the

Second Circuit's decision — the adoption of any "economic impact [as] the litmus test for ERISA preemption." *See* Pet. at 7; *see* also Pet. at 12 ("Second Circuit's economic impact test").

Neither this Court nor any other court has ever questioned the propriety of considering a state law's direct economic impact upon ERISA plans in adjudging whether the state enactment falls within the ambit of ERISA pre-emption. Indeed, it is difficult to conceive of a state law that more clearly relates to ERISA plans than one which directly assesses contributions and other payments that fund the health-care benefits provided to plan beneficiaries. The Second Circuit's decision in this case, therefore, hardly breaks new ground. It is perfectly compatible with this Court's pre-emption jurisprudence, and nothing in the petition suggests otherwise.

The Second Circuit adhered to the congressional directive that state tax laws of general applicability are not immune from ERISA pre-emption.[2] It applied the ordinary, common-sensical meaning of the statutory "relate to" standard and

[2] When ERISA was first under legislative consideration in 1974, Congress underscored its objective of expansive pre-emption by rejecting a request by the Secretaries of Labor and Treasury to exclude state tax laws from ERISA pre-emption. *Northwest Airlines v. Roemer*, 603 F. Supp. 7, 12 (D. Minn. 1984). In 1983 Congress added a specific provision reaffirming that ERISA's pre-emption clause applied to state tax laws. 29 U.S.C.A. § 1144(b)(5)(i) (West 1985). The conference report on this amendatory legislation instructed that "preemption is *continued* with respect to . . . any State tax law relating to employee benefit plans . . . ." *See* H.R. CONF. REP. No. 984, 97th Cong., 2d Sess. 18 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4603 *(emphasis added)*. In light of this explicit congressional intent, "[t]he fact that a State tax law of general application is at issue is therefore not determinative of ERISA preemption." *Morgan Guar. Trust Co. v. Tax Appeals Tribunal*, 80 N.Y.2d 44, 51, 587 N.Y.S.2d 252, 256, 599 N.E.2d 656 (1992); *see also E-Systems, Inc. v. Pogue*, 929 F.2d 1100, 1103 (5th Cir.), *cert. denied.*, 112 S. Ct. 585 (1991).

found that a state tax assessment levied upon employer and employee contributions to a medical center operated by an ERISA welfare plan to provide medical benefits to plan beneficiaries has a direct connection to the plan and is pre-empted not in its entirety but only insofar as it assesses those contributions.[3] Indeed, every court that has addressed a state tax law that directly assesses plan contributions or plan benefits has found that the state enactment relates to ERISA plans and is pre-empted. *E-Systems, Inc. v. Pogue*, 929 F.2d 1100, 1103 (5th Cir.), *cert. denied*, 112 S. Ct. 585 (1991) (tax on healthcare benefits paid by plan); *General Motors Corp. v. California State Bd. of Equalization*, 815 F.2d 1305, 1309 (9th Cir. 1987), *cert. denied*, 485 U.S. 941 (1988) (tax computed on basis of healthcare benefits paid by plan); *Birdsong v. Olson*, 708 F. Supp. 792, 798, 801 (W.D. Tex. 1989) (tax on healthcare benefits paid by plan); *National Carriers' Conference*

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[3] The controlling test for determining whether a state law meets the "relate to" standard of ERISA § 514(a) is simple and direct: every state law that has a connection with or reference to an ERISA employee benefit plan relates to that plan and is pre-empted, whatever the state law's underlying purpose and intent. *Greater Wash. Bd. of Trade*, 113 S. Ct. at 583; *FMC*, 498 U.S. at 58-59; *Shaw*, 463 U.S. at 96-97. The "relate to" standard must be interpreted broadly, *see Shaw*, 463 U.S. at 98; it must be given "a broad common sense meaning," *see Ingersoll-Rand*, 498 U.S. at 139. The "relate to" touchstone does not limit ERISA pre-emption only to state laws specifically designed to regulate the terms and conditions of employee benefit plans or those dealing with the subjects of regulatory concern covered by ERISA — reporting, disclosure, fiduciary responsibility, and the like. *Ingersoll-Rand*, 498 U.S. at 137; *Shaw*, 463 U.S. at 98. Pre-emption prevails even if the state law is not specifically designed to affect ERISA plans or the state law's connection, reference, or effect is only indirect, *see Greater Wash. Bd. of Trade*, 113 S. Ct. at 583; *Ingersoll-Rand*, 498 U.S. at 139; *Pilot Life*, 481 U.S. at 47, or the state law is "consistent with ERISA's substantive requirements," *see Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985).

Comm. v. Heffernan, 454 F. Supp. 914, 917 (D. Conn. 1978) (same).[4]

The Second Circuit had little difficulty dispelling petitioners' wolf cry, which is repeated in the petition to this Court, that pre-emption of the assessment on contributions would shield ERISA plans "from numerous other forms of state regulation which result in increases in the cost of doing business, such as unemployment taxes, sales taxes, utility costs, or numerous wage laws." *See* Pet. at 10-11; *see also* Pet. at 12 ("staffing requirements," "nursing standards," and "disposal of medical wastes"). These exactions and regulations affect ERISA plans as they do all others in society in their roles as employers, purchasers, and regulated businesses. The tax on contributions, however, affects ERISA plans *qua* employee benefit plans; it affects the very activities and functions that make employee benefit plans what they are. "It does not touch the Fund only slightly on the outer limits of its plan activities; it affects the very operations and functions that make the Fund what it is, a provider of medical, surgical, and hospital care to its participants and their beneficiaries." *Axelrod*, 27 F.3d at 827. It is hardly remarkable, then, for the Second Circuit to have concluded that Congress intended the express pre-emption clause of ERISA to proscribe state assessments that

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[4] The only state tax laws that have survived ERISA pre-emption are withholding and delinquency-garnishment procedures that assess not the plan but the beneficiary and thus have no effect upon the amount of plan benefits or contributions. *See Retirement Fund Trust of Plumbing v. Franchise Tax Bd.*, 909 F.2d 1266, 1281 (9th Cir. 1990); *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 556 (6th Cir. 1987); *see also Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988) (monies subject to state garnishment had already been earmarked for judgment debtor so that application of state garnishment law did not affect amount of plan benefits due other beneficiaries); *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142 (2d Cir.), *cert. denied*, 493 U.S. 811 (1989) (same result for state escheat law).

sap the lifeblood of ERISA plans and directly hinder their essential functions.

The real reason advanced in support of the requested writ of certiorari in this case is not the resemblance with *Travelers*, which just does not exist, *see supra* pp. 1-4, nor the presence of any unique principle of law that departs from the prevailing body of ERISA pre-emption law previously fashioned by this Court and other federal tribunals but petitioners' quarrel with both the Second Circuit's finding of a direct effect, *see* Pet. at 9-10, and Congress's policy of expansive pre-emption, *see* Pet. at 11-12. The former disaffection involves a factual disagreement, *see, e.g.*, Pet. at 10 (claimed absence of "evidence in the record to support that conclusion"), which does not qualify as the type of special and important reason that would warrant the exercise of certiorari jurisdiction. *See* Sup. Ct. R. 10. This Court does not sit as a court of errors and appeals to review the factual findings of inferior tribunals.

The latter disagreement is not a justiciable controversy. New York and other states which have either adopted health-care legislation, *see* Pet. at 11 n. 12, or are contemplating legislation in this area are well aware of the limits imposed by ERISA pre-emption. These states know exactly where to go for remedial relief. They have united in informal coalitions and ad hoc groups, which have adopted the strategy of each state petitioning Congress to enact a special waiver exempting that state's regulatory regime from the restrictions of ERISA pre-emption. *See Preemption: States, Employers Expect Battle Over ERISA Restrictions Next Year*, 21 Pens. & Benefits Rep. (BNA) 1838 (Sept. 26, 1994); *State Reform: States To Pressure Congress For ERISA Exemptions To Enact Reforms*, 21 Pens. & Benefits Rep. (BNA) 1867 (Oct. 3, 1994); *Preemption: ERISA Waivers Would Create Legal Nightmare, Attorney Says*, 21 Pens. & Benefits Rep. (BNA) 1983 (Oct. 10,

1994).[5] Congress in its wisdom enacted in ERISA a deliberately broad pre-emption provision that protects ERISA plans from rapacious state taxes and other revenue-enhancing regulatory schemes. It is not the function of this Court or any other tribunal in the Judicial Branch to override the policy decisions of the Legislative Branch. If congressional policy is to be revamped, recourse must be sought in the halls of Congress, not in the chambers of this Court.

This case presents no conflict with Supreme Court precedent, no discord among the circuits, no departure from the prevailing law of ERISA pre-emption, no kinship to the "indirect economic effect" test that is now before this Court in *Travelers*. The Second Circuit in this case, as did every other tribunal that has entertained the same question, applied established precedent to invalidate the immediate and direct imposition of a state tax levy on contributions to an ERISA plan. Petitioners may quibble with the Second Circuit's finding of a direct effect, and they may dislike the underlying congressional policy that led to the enactment of the expansive ERISA pre-emption provision. But neither disappointment with the factual analysis of a court of appeals nor disagreement with the will of Congress is a valid ground for certiorari. There is no reason for this Court to become involved in this

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[5] Only Congress can save specific state enactments from ERISA's pre-emptive reach. Hawaii's Prepaid Health Care Act would have been pre-empted by ERISA, were it not for an express congressional dispensation. *See* 29 U.S.C.A. § 1144(b)(5) (West 1985 & Supp. 1993); *see generally Retirement Fund Trust of Plumbing v. Franchise Tax Bd.*, 909 F.2d 1266, 1277-78 (9th Cir. 1990) (explaining the legislative history of the special exception afforded Hawaii's healthcare legislation under ERISA). The current campaign for ERISA waivers has not yet met with the same success. Recently, Congress did not enact the waiver sought by the State of Washington for its Health Services Act. *See Report Proposals: Washington To Pursue Reforms Despite Lack of ERISA Waiver*, 21 Pens. & Benefits Rep. (BNA) 1987 (Oct. 17, 1994).

litigation or to defer disposal of this case until after its adjudication of the *Travelers* case. The petition for a writ of certiorari should be denied.

Dated: New York, New York
November 8, 1994

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